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No. 93-405

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DIGITAL EQUIPMENT CORPORATION,
Petitioner,
v.
DESKTOP DIRECT, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

THOMAS C. SIEKMAN
ANDREW C. HOLCOMB
DIGITAL EQUIPMENT CORPORATION
111 Powdermill Road
Maynard, MA 01754
(508) 493-3264

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

LAURENCE R. HEFTER
DAVID M. KELLY
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-4000
Counsel for Petitioner

* Counsel of Record

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TABLE OF AUTHORITIES

Cases	Page
Barnes v. *E-Systems, Inc.*, 112 S. Ct. 1 (1991)	2
Curry v. *Baker*, 479 U.S. 1301 (1986)	2
Forbus v. *Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992)	2, 3
Grillet v. *Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991)	2, 3, 4
Hicks v. *Feiock*, 479 U.S. 1305 (1986)	2
Janneh v. *GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990)	2, 3, 4
Towers Hotel Corp. v. *Rimmel*, 871 F.2d 766 (8th Cir. 1989)	2, 3
Transtech Industries, Inc. v. *A & Z Septic Clean*, No. 92-5636 (3d Cir. Sept. 17, 1993)	2, 5
United States Postal Service v. *Letter Carriers*, 481 U.S. 1301 (1987)	2
Statutory Provisions	
28 U.S.C. § 1291	5
28 U.S.C. § 1292(b)	5, 6

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REPLY BRIEF FOR PETITIONER

The opposition to certiorari filed by respondent Desktop Direct, Inc. ("Desktop") fails to rebut petitioner's showing that the decision below creates a sharp conflict among the circuits on a question of federal jurisdiction that should be resolved by this Court.[1] On the contrary, developments since the petition was filed confirm the need for this Court to grant the writ.

1. When petitioner Digital Equipment Corporation ("Digital") filed its petition for certiorari, it also filed an application for a stay with Justice Thomas as Circuit Justice for the Tenth Circuit. Justice Thomas referred the application to the whole Court, and on October 4, 1993, this Court granted the stay without recorded dissent. *Digital Equipment Corporation* v. *Desktop Direct, Inc.*,

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[1] The statement required by S. Ct. Rule 29.1 appears at Pet. ii.

No. A-252 (Oct. 4, 1993). This Court has therefore concluded that there is at least "a reasonable probability that certiorari will be granted" and "a significant possibility that the judgment below will be reversed." *Barnes v. E-Systems, Inc.*, 112 S. Ct. 1, 2 (1991) (Scalia, J., Circuit Justice).[2] Nothing in the opposition filed by Desktop undermines that conclusion.[3]

2. Indeed, the likelihood of certiorari being granted is even stronger now than it was when Digital filed its petition. Four days after Digital's petition was filed, the Third Circuit decided *Transtech Industries, Inc.* v. *A & Z Septic Clean*, No. 92-5636 (3d Cir. Sept. 17, 1993). In that case, the court held that the district court's refusal to enforce a settlement agreement was not immediately appealable under the collateral order doctrine. The court noted the "line of cases holding that interlocutory orders denying enforcement of settlement or release agreements are immediately appealable," citing *Forbus* v. *Sears, Roebuck & Co.*, 958 F.2d 1036, 1039-40 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992); *Grillet* v. *Sears, Roebuck & Co.*, 927 F.2d 217, 219-220 (5th Cir. 1991); *Janneh* v. *GAF Corp.*, 887 F.2d 432, 436 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990); and *Towers Hotel Corp.* v. *Rimmel*, 871 F.2d 766, 769-770 (8th Cir. 1989). 1993 U.S.

[2] *See also, e.g., Curry* v. *Baker*, 479 U.S. 1301, 1302 (1986) (Powell, J., Circuit Justice) (showing of "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and a "significant possibility that a majority of the Court will conclude that the decision below was erroneous" necessary for a stay); *United States Postal Service* v. *Letter Carriers*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C. J., Circuit Justice); *Hicks* v. *Feiock*, 479 U.S. 1305, 1306 (1986) (O'Connor, J., Circuit Justice). Respondent fails to mention this Court's grant of the stay in its statement of the case. *See* Opp. at 2-3.

[3] It should be unnecessary to point out that Digital disagrees with Desktop's argumentative statement of the case. What is important to note is that the factual disagreements between the parties on the underlying merits in no way affect the purely legal jurisdictional question presented.

App. Lexis 23888, *13-*14.[4] After noting that the case before it was distinguishable in that the settlement involved a non-party to the litigation (the United States), the Third Circuit stated that "[m]ore significant, however, is our disagreement with the decisions in *Forbus, Grillet, Janneh,* and *Towers.*" The Third Circuit instead expressly agreed with the decision of the Tenth Circuit below. *Id.* at *14.

This very recent decision highlights the split in the circuits on the question presented here, and the need for this Court to resolve the persistent conflict. The decision also confirms the frequency with which this issue arises in the federal courts, and—by agreeing with the decision below (the minority view) and expressly disagreeing with the other circuits that have considered the issue—solidifies the circuit conflict. The conflict is, moreover, a current one. All of the cases discussing the issue have been decided within the last four years. The conflict is ripe for resolution by this Court.

3. Desktop cannot and does not deny the existence of this circuit conflict. arguing only that the sharp conflict can be "substantially dulled." Opp. at 10. Indeed, Desktop does not even attempt to distinguish the recent decision of the Eleventh Circuit in *Forbus,* instead simply asserting that it was wrongly decided. Opp. at 9. Desktop contends that the Second Circuit's decision in *Janneh* is distinguishable, but the alleged distinction is transparently irrelevant to the question presented. According to Desktop, there was a valid settlement in *Janneh* but not

[4] *Forbus, Grillet,* and *Janneh* are discussed in Digital's petition. *See* Pet. at 7-11. In *Towers Hotel Corp.*, the Eighth Circuit held that the district court's refusal to order the release of escrowed funds pursuant to a settlement agreement was immediately appealable under the collateral order doctrine. The court found that the decision conclusively interpreted the relevant provision of the settlement agreement, resolved an important issue separate from the merits of the underlying litigation, and would not be subject to review at a later point in time.

in this case. Opp. at 8-9. We of course believe that there is a valid settlement here, but that dispute goes to the merits—not to the jurisdictional question presented.

Desktop's purported distinction of the Fifth Circuit's decision in *Grillet* is similarly unavailing.[5] The court in that case—relying on the Second Circuit's decision in *Janneh*—held that a district court's refusal to enforce an agreement not to litigate was appealable under the collateral order doctrine. 927 F.2d at 219-221. Contrary to Desktop's representation, the court did not "indicate[] that the collateral order doctrine would not apply if the appellate court were reviewing the question of whether the release was obtained through fraud." Opp. at 8. Instead, the court stated that the issue would be "closer" if the defendant did not also rely on the plaintiff's subsequent ratification of the release. 927 F.2d at 219. The reason is that the plaintiff's allegations concerning the release were among the acts of employment discrimination that formed her underlying claim. Here Desktop's allegations concerning the settlement agreement are in no sense part of its underlying claim of trademark infringement, so the *Grillet* court's holding is fully applicable. That is what the Tenth Circuit below recognized in citing *Grillet* as conflicting authority. Pet. App. 3a-4a & n.1.[6]

Most important, Desktop's attempt to distinguish some of the conflict cases rings hollow given that the courts of appeals themselves have expressly noted the conflict among the circuits. The Tenth Circuit below candidly explained that it "disagree[d]" with the Second, Fifth.

[5] Desktop states that "[w]hile a Fifth Circuit case, *Grillet* was actually written by Judge Duhé of the Eleventh Circuit." Opp. at 8 n.6. The significance of the point is not clear, but it should be noted that Desktop is misinformed. Judge Duhé sits on the Fifth Circuit.

[6] This case in any event also involves the same ratification issue the *Grillet* court found significant in its analysis. Respondent continues to retain the substantial sum it received under the settlement agreement.

and Eleventh Circuits, and was "part[ing] company with" those courts. Pet. App. 3a, 5a. The Third Circuit in *Transtech* also acknowledged the circuit conflict and deepened it by agreeing with the Tenth Circuit. 1993 U.S. App. Lexis 23888, *13-*14.

4. Desktop's arguments on the merits of the jurisdictional issue do nothing to mitigate this circuit conflict. The suggestion that the Settlement Agreement did not confer on Digital the right to avoid trial on Desktop's claim is frivolous; indeed, Desktop cannot quite bring itself to embrace the contention, noting only that it is arguable. *See* Opp. at 4 n.4. Conferring the right to avoid trial is what settlement agreements do; the one in this case was, not surprisingly, expressly contingent on dismissal of Desktop's pending suit and contained a release of all claims. *See* Pet. at 3.

Desktop's only answer to the point that failure to allow immediate appeal would irreparably deprive Digital of its right to avoid trial is the glib one that Digital could avoid trial by defaulting. Opp. at 6. But this argument proves far too much, for it would defeat the collateral order doctrine in all circumstances. The same argument could have been made with respect to the defendant with a double jeopardy claim, the public official with a qualified immunity claim, or a state agency with an Eleventh Amendment immunity claim—all situations in which this Court has upheld appeals under the collateral order doctrine.

5. Desktop is also wrong to contend that Digital should not be permitted to appeal under the collateral order doctrine because it did not seek leave to appeal under the entirely distinct route of 28 U.S.C. § 1292(b). Appeal under the collateral order doctrine is an appeal of right based in this Court's longstanding interpretation of 28 U.S.C. § 1291; the Section 1292(b) route is doubly discretionary, with the district court and the court of appeals. Desktop cites no authority—and we are aware of none—for the proposition that invocation of Section

1292(b) procedures is a prerequisite to an appeal under the collateral order doctrine.

* * * *

There is a sharp conflict among the circuits, recognized by the court below and now by the Third Circuit as well. This Court has already indicated the cert-worthiness of this case by granting the stay. The Court should grant the writ and reverse the decision below.

Respectfully submitted,

THOMAS C. SIEKMAN
ANDREW C. HOLCOMB
DIGITAL EQUIPMENT CORPORATION
111 Powdermill Road
Maynard, MA 01754
(508) 493-3264

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
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1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-4000

* Counsel of Record

Counsel for Petitioner